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In the Supreme Court of the United States

October Term, 1981

ALPHONSO RANDOLPH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOR THE FIRST JUDICIAL DISTRICT

STEVEN B. MUSLIN
IRA A. MOLTZ
Attorneys at Law
100 N. LaSalle Street
Suite 900
Chicago, Illinois 60602
(312) 263-7249

EDWARD M. GENSON
134 N. LaSalle Street
Suite 306
Chicago, Illinois 60602
(312) 726-9015
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-0581

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner was denied due process of law where the State waited 43 months to file its petition to revoke his probation, and where said petition was filed subsequent to the expiration of said term of probation.

PARTIES

All parties are named in the caption.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

ALPHONSO RANDOLPH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOR THE FIRST JUDICIAL DISTRICT

Alphonso Randolph, Petitioner, respectfully asks that a writ of certiorari issue to review the judgment of the Appellate Court of the State of Illinois, First Judicial District, in *People of the State of Illinois, Plaintiff-Appellee* v. *Alphonso Randolph, Defendant-Appellant,* No. 80-240, which affirmed the finding of violation of probation and subsequent three-year penitentiary sentence on the original theft conviction.

REPORTED DECISIONS

The opinion of the Appellate Court, *People* v. *Randolph*, appears at 98 Ill. App. 3d 696, 424 N.E.2d 893 (1981). A copy of the opinion appears as an appendix to this petition. The order of the Supreme Court of Illinois denying leave to appeal is not yet reported. A copy of that order likewise appears in the appendix to this petition.

JURISDICTION

1. The Appellate Court of Illinois affirmed petitioner's convictions by decision filed July 28, 1981. Petitioner then sought leave to appeal by petition to the Supreme Court of Illinois filed on October 15, 1981. The Illinois Supreme Court denied leave to appeal by order dated January 12, 1982. On February 17, 1982, Justice Simon of the Illinois Supreme Court entered an order staying issuance of the mandate of that court pending resolution of this petition for writ of certiorari. No extension of time within which to petition for certiorari has been sought or allowed.

2. Jurisdiction lies to this court under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Sec. 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

On June 18, 1975, Alphonso Randolph pleaded guilty to an information numbered 75 I 1645 charging him with theft, and pursuant thereto was sentenced to four years probation, by his Honor Judge Paul F. Gerrity.

Six months later, on December 31, 1975 while patrolling an area near Deel Ford, in Posen, Illinois, Sergeant Randall E. Wolfe observed an automobile stop and let an unknown individual out, then continued on in an easterly direction. As he followed the moving vehicle, he passed Deel Ford's parking lot, where he observed, from a distance of about ten feet, the individual whom he believed to be the same one that had gotten out of said moving vehicle, alighting from a black Ford truck parked in Deel's lot.

Admittedly his attention was focused on the moving vehicle, not said individual and he continued in pursuit without stopping, until he overtook said vehicle, and placed the driver under arrest. Upon completion of said arrest, he returned to his squad and radioed what he believed to be a description of the unknown individual he had observed in Deel Ford's parking lot. This description consisted of the following: male, black, stocky build. After putting out the radio message he returned to the Deel Ford lot and made an inspection of the aforementioned black Ford truck. As a result of his inspection he recovered a lock pulley, and screwdriver which he placed on the front seat of his squad car, without making any identifying marks thereon, at this, or any other time. Shortly thereafter in response to a dispatch indicating that a subject matching his earlier radio description had been apprehended by a Dixmoor Police officer, named Hollaway, at a Texaco gas station in the near vicinity, he went to said Texaco gas station where he met with officer Joseph Underwood, a security guard for Deel Ford, Officer Hollaway of Dixmoor Police Department, and the subject in custody, Alphonso Randolph. Upon his arrival at the Texaco station he identified Alphonso Randolph as being the unknown individual whom he had seen earlier in Deel Ford's parking lot, taking him to the Posen Police Department.

On the same date, Joseph Underwood was working as a security guard for Deel Ford. At approximately 2:45 a.m., while he was at the north end of Deel's 3½ acre lot, he heard officer Wolfe's radio broadcast regarding a subject in a black Ford pick-up truck. As he could not see the truck in question from his vantage point, he went to the south end of the lot, where the truck was parked. When he was approximately 200-300 feet away from the black

truck he observed an unknown individual running away from him. In order to pursue this subject Underwood went back to his auto, thereafter heading in the direction of the Texaco gas station. Upon his arrival at said Texaco station Alphonso Randolph was in the custody of Officer Hollaway.

As a result of his arrest of December 31, 1975, the Petitioner's said cause was continued to April 27, 1976. On April 27, 1976, pursuant to the charge of attempt theft, Alphonso Randolph again appeared in court, before his Honor Judge Dwight McKay, without counsel. On this date the information numbered 75-I-6-137 file was present, the state made mention of a petition for violation of Mr. Randolph's probation; however, the "memorandum of orders" (half sheet) of this date does not indicate the same was ever filed with the clerk of the court, nor was a warrant or summons issued or a bond set to secure Mr. Randolph's appearance, or to toll his probationary period. In fact the charge of attempt theft was merely continued to a future date.

On February 16, 1978, Alphonso Randolph was arrested at approximately 7:00 p.m., while a passenger in a parked vehicle, in front of 15019 Artesian, Markham, Illinois. At the time of his arrest, he was not in violation of any city, state, or federal law. This arrest was made by Douglas Newton, an officer of the Harvey Police Department. Earlier that date, while off duty, Officer Newton observed four individuals near a garage behind 15019 Artesian, Markham, Illinois loading automobile parts into a Budget Rental van. As Officer Newton approached the garage to get a better look, the individuals went inside, closing the door behind them. Based upon this information Officer Newton obtained a warrant to search the aforesaid garage.

Armed with the warrant Officer Newton returned to the garage, conducted a search therein, determined that the vehicles contained therein had been stolen from Chicago, Illinois and were the property of Alvin Edwards, and Arthur James. Later that same evening, Officer Newton arrested Bill Bruton, owner of the premises at 15019 Artesian, Markham, Illinois, and Greg Davis, driver of the Budget rental van. After said arrests, the auto parts found in the Budget Rental van, were not matched to the two vehicles found earlier in the aforesaid garage. Alphonso Randolph's arrest occurred approximately four hours after the arrest of Bruton and Davis.

On November 13, 1979 the State filed a document entitled "Supplemental Petition for Violation of Probation" in the case of People of the State of Illinois v. Alphonso Randolph, numbered 75 I-6-137. This Supplemental Petition for Violation of Probation, was based upon Mr. Randolph's arrest of February 16, 1978.

On December 19, 1979, Alphonso Randolph appeared before his Honor Judge Paul Gerrity, in the Circuit Court of Cook County, in Markham, Illinois, pursuant to proceedings to violate the probation imposed under 75 I-6-137. A motion was then made by Mr. Randolph, to terminate said proceedings, in that Mr. Randolph's probation had expired as matter of law on June 15, 1979, and as such the court lacked jurisdiction over the probationer. After said motion was heard and denied, a hearing to determine whether or not Mr. Randolph had violated the probation imposed on 75 I-6-137 was held. At said hearing, testimony was heard from Officer Randall E. Wolfe, Joseph Underwood, Alvin C. Edwards, Arthur James, Officer Douglas Newton, Kevin Kelly, and Alphonso Randolph. The testimony of Officer Wolfe, Underwood, James, and

Edwards, was substantially as summarized above. Kevin Kelly testified that he was present at the premises located at 15019 Artesian, Markham, Illinois, on February 16, 1978, during the afternoon hours, and did not see Alphonso Randolph at anytime that date.

Alphonso Randolph testified among other things that on December 31, 1975, he was visiting his sister, and had walked across the street to a Texaco gas station to buy a pop and make a phone call, when he was arrested by a Dixmoor Police officer Hollaway, in connection with a recently attempted theft at Deel Ford. He further testified that on February 16, 1978, he had not been in or at the premises of 15019 N. Artesian, Markham, Illinois, but had just arrived as a passenger in a friends auto, when he was arrested by Officer Newton in the front of a said premises. At the conclusion of all evidence, the court found Mr. Randolph in violation of probation, ordered a presentence investigation, and continued the cause for sentencing to January 22, 1980.

On January 22, 1980, as a result of the Violation of Probation, Alphonso Randolph was sentenced to a period of 3 years in the Illinois Department of Correction. He was not given credit for time served on probation prior to the alleged violation. The speedy hearing and due process arguments were represented to the Illinois Appellate Court, First District, which rejected said contentions in affirming the trial court's judgment.

ARGUMENT AND REASONS FOR ALLOWING THE WRIT OF CERTIORARI

This case presents a substantial question of federal constitutional law pertaining to the question of the application of the Sixth Amendment right to a speedy trial to probation revocation proceedings. It also raises the issue of at what point, if any, an individual's Fourteenth Amendment guarantee of due process is violated by an extraordinary delay in the filing and hearing of a probation revocation petition.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778, 36 L. Ed. 2d 656 (1973) this Court held that a probationer prior to revocation is entitled to a preliminary hearing to determine whether there is probable cause to believe that he has violated probation. He is also entitled to a final hearing which must include at a minimum:

> Written notice of claimed violations; disclosure of evidence against him; opportunity to be heard and present witnesses; right to confront and cross-examine witnesses; neutral and detached hearing body; and written statement of evidence relied on for revoking probation.

In *United States* v. *Marion*, 404 U.S. 307, 30 L. Ed. 2d 468 (1971), the Supreme Court noted that the Due Process Clause may require dismissal of an indictment if it were shown at trial that pre-indictment delay caused substantial, actual prejudice to the defendant. In *Dillingham* v. *United States*, 423 U.S. 64, 46 L. Ed. 2d 205 (1975), the Court extended its prior holding by ruling that the protection of the Sixth Amendment is activated when a criminal prosecution has begun. At the point of defendant's arrest, the speedy trial provision went into effect.

In the instant cause, the petition was brought before the Circuit Court of Cook County, Illinois on April 27, 1976. While the State indicated a desire to file a Petition for Violation of Probation, there is no indication on the face of that document that said petition was ever filed. (Tr. 234) In addition the "Memorandum of Orders" does not indicate the filing of any such petition. (Tr. 222-223)

On November 13, 1979—43 months later—the State filed what it euphemistically referred to as a "Supplemental Petition For Violation of Probation." A hearing on said Petition was held on December 19, 1979 at which time petitioner's probation was revoked. This all occurred despite the fact that petitioner's four year probationary term ended on June 18, 1979—prior to the filing of the "Supplemental Petition" and the subsequent hearing.

The Illinois Appellate Court Opinion acknowledges that "unless probation had been tolled or revocation proceedings had begun by June 18, 1979, defendant's probationary term expired and the court was prevented from entertaining a revocation hearing thereafter." (Appellate Court Opinion, page 4) The Court accepted the State's claim that probation had been tolled by the filing of a revocation petition on April 27, 1976. This is despite the fact that both the Appellate Court and the State concede that the common law record reveals that no such petition was filed on that date and in fact, that the State waited 43 months until November, 1979 to file what it cryptically labelled a "supplemental" revocation petition.

In examining the record as a whole, it is clear that the State's contention that its petition was timely filed does not logically jibe with the facts of this case. From April 27, 1976—the date the State maintains it filed its Petition —until February 16, 1978, when the defendant was ar-

rested on an unrelated charge, the State took no action to prosecute or make any other disposition on a revocation petition. Mr. Randolph was at large in society and if, in fact, such a revocation petition actually existed, it is thoroughly unexplainable why the State took no action on said petition. The only logical answer for the State's lack of its usual diligence is that everyone operated under the assumption that no such revocation petition existed. Perhaps, as the report of proceedings appears to indicate, the State *intended* to file and prosecute such a petition but the subsequent case history reveals that no such action was ever taken.

The record thus clearly reveals that Mr. Randolph's term of probation was never tolled in accordance with the statutory requirements and, therefore, his four year probationary period expired on June 18, 1979. This was six months prior to the revocation hearing held on December 19, 1979 and five months prior to the filing of the State's revocation petition on November 13, 1979. Accordingly, it is evident that the appellant was beyond the court's jurisdiction when the revocation hearing was held, and that the Appellate Court's ruling to the contrary should be reviewed and, ultimately, reversed.

CONCLUSION

WHEREFORE, petitioner Alphonso Randolph respectfully asks that a writ of certiorari issue to the Appellate Court of Illinois, First Judicial District, to review the judgment in *People* v. *Randolph*, No. 80-240, and that upon review by this court that the finding of violation of probation and the subsequent sentence imposed as a result thereof be reversed.

Respectfully submitted,

ALPHONSO RANDOLPH, Petitioner

By: */s/ Ira A. Moltz*
IRA A. MOLTZ, his attorney

STEVEN B. MUSLIN
Attorney at Law
100 N. LaSalle
Suite 900
Chicago, Illinois 60602
(312) 263-7249

IRA A. MOLTZ
20 North Clark
Suite 2300
Chicago, Illinois 60602
(312) 236-3709
Of Counsel

APPENDIX

Second Division

July 28, 1981

No. 80-240

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

ALPHONSO RANDOLPH,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County

Honorable Paul F. Gerrity, Judge Presiding.

Mr. JUSTICE DOWNING delivered the opinion of the court:

Defendant Alphonso Randolph,[1] having been sentenced to a term of 4 years probation after pleading guilty to a theft offense, was brought before the circuit court on charges that he violated the terms of probation. After overruling defendant's objections to the proceeding, the circuit court conducted a hearing on the probation violation charges. The court found defendant to have violated probation and sentenced him to a term of 3 years incarceration on the underlying theft offense.

[1] In the record, defendant is also referred to as Alphonzo Randolph.

On appeal, defendant contends (1) that the circuit court lacked jurisdiction to entertain the probation violation proceedings on the day on which they were held; (2) that a supplemental petition for violation of probation filed by the state 43 months after the initial petition was prejudicial; (3) that the circuit court erred in admitting evidence allegedly related to a crime upon which the probation violation was based where neither a chain of custody nor positive identification thereof was allegedly made; (4) that the evidence presented by the state failed to demonstrate by a preponderance that defendant had violated probation on either of two occasions; and (5) that the circuit court's sentence was excessive.

On June 18, 1975, defendant pleaded guilty to one count of theft. (Ill. Rev. Stat. 1975, ch. 38, par. 16-1(d)(2).) He received a sentence of 4 years probation. In the early morning hours of December 31, 1975, defendant was arrested by an officer of the Posen (Illinois) Police Department for attempt theft. (Ill. Rev. Stat. 1975, ch. 38, par. 8-4.) As a consequence of this arrest, the state prepared a petition for violation of probation. The parties here dispute whether this petition was indeed filed with the court on April 27, 1976. In any event, defendant appeared in court on that date without his attorney. In light of this circumstance, the court continued the proceedings.

The common law record shows that thereafter the case was continued for various reasons over the next year. The common law record contains a gap for the period between May 1977 and November 1979.

In the interim, defendant was again arrested on February 16, 1978, in Markham, Illinois. As a result of this arrest, on November 13, 1978, the state filed a supplemental petition for violation of probation. On December 13

of that year, the circuit court conducted a hearing on the original and supplemental petitions. At that hearing, the state called the following witnesses to testify concerning both arrests underlying the two petitions before the court.

Sergeant Randall E. Wolfe of the Posen Police Department, who arrested defendant on December 31, 1975, observed defendant's activities that night in and around a black truck parked on the lot of Deel Ford. Upon inspecting the truck after defendant had left the scene, Wolfe found that the truck's right vent window had been broken and its ignition had been pulled by a "dent puller." He also found that the truck's engine was running. From the truck, Wolfe recovered the "dent puller" and a screwdriver, which he tagged but made no other marks upon. These items were admitted into evidence over defendant's objection at the hearing.

Joseph Underwood, Deel Ford's security agent on that night, testified he heard Wolfe's radio call concerning defendant's activities. Underwood saw defendant flee from the lot. He later examined the truck and found that its right front window had been broken, "the ignition was running and the engine had been pulled." Underwood also testified as to his employment background with Deel Ford.

Officer William D. Newton of the Harvey (Illinois) Police Department testified regarding defendant's February 16, 1978 arrest. He observed several individuals, including defendant, loading car parts from a garage onto a truck. In the garage, he saw two cars which were missing those parts. Later, when executing a search warrant for the garage, he learned by radio call that the cars were stolen. Defendant was arrested later that day.

Defendant testified that on December 31, 1975, he had been visiting his sister who lived near Deel Ford; that he

went to a Texaco station to buy a can of soda, and was stopped by a policeman. The latter accused him of being a thief and placed him under arrest. This policeman then turned defendant over to Sergeant Wolfe who had arrived on the scene. Defendant denied that he had been at the Deel lot that night. He denied that he possessed a "body puller" used to pull ignitions.

Thereafter, the trial court ruled that the state had proved by a preponderance of the evidence that defendant violated probation on December 31, 1975 and February 16, 1978. After a presentence investigation, report, and hearing, defendant elected to be sentenced under the statutory provisions currently in effect. The trial court sentenced defendant to 3 years imprisonment for the theft offense underlying the initial sentence of probation. No credit was given for time on probation.

I.

Defendant first claims that his probation term had expired prior to the hearing for violation, and that the circuit court therefore lacked jurisdiction to entertain the probation violation petitions. Central to defendant's contention is his assertion that the state never formally filed the original petition which the state argues was filed on April 27, 1976.

The circuit court retains jurisdiction over a defendant who is serving a sentence of probation only so long as that period is yet in effect. This is so unless it has been tolled or revocation proceedings have begun within the period which have not been resolved due to a "sufficient reason for delay." Otherwise, once the period has lapsed, probation is terminated and there remains nothing to revoke. (See *People* v. *Ramirez* (1st Dist. 1970), 131 Ill. App. 2d

268, 271, 266 N.E.2d 520.) Here, unless probation had been tolled or revocation proceedings had begun by June 18, 1979, defendant's probationary term expired and the court was prevented from entertaining a revocation hearing thereafter.

Defendant rests his argument on this issue upon the absence of a notation upon the half-sheet that a petition was filed on April 27, 1976. However, he ignores the fact that the record contains a copy of the petition signed by the circuit court judge before whom defendant appeared on that day. Additionally, the report of proceedings clearly indicates that the state tendered a petition and that the court read relevant parts of it to defendant. We consequently must reject defendant's assertion that no petition was filed on the noted date. See *People* v. *Kelly* (1st Dist. 1976), 39 Ill. App. 3d 190, 194, 350 N.E.2d 163, *appeal denied*, 63 Ill. 2d 560; *People* v. *DePratto* (1st Dist. 1976), 36 Ill. App. 3d 338, 342, 343 N.E.2d 628 (report of proceedings controls over common law record).

We further believe that the filing of this petition, in conjunction with the ensuing circumstances, served to toll defendant's probation period. The relevant statute provides that a probation term is tolled by the issuance of a warrant or summons pursuant to a probation revocation petition. (Ill. Rev. Stat. 1975, ch. 38, par. 1005-6-4(a).) However, these are not the exclusive methods by which the term may be tolled. Where a defendant is given notice of the state's intent to revoke his probation, appears in court pursuant to that notice, and proceedings begin, the court retains jurisdiction to decide the matter even after the end of the probation term, as these events also serve to toll that period. (*People* v. *Speight* (1st Dist. 1979), 72 Ill. App. 3d 203, 209-10, 389 N.E.2d 1342.) Here, the record indicates that defendant's probation officer notified

him that a revocation petition had been drawn and that he was to appear in court pursuant to it on April 27, 1976. While defendant was to appear in court on that date to separately answer other charges which also served as the basis for the petition, we believe that his presence was at least in part due to the petition itself.[2] Therefore, the events of that date served to toll the probation term. Since the subsequent delay in bringing the petition up for a hearing was due in part to numerous motions for continuance filed by defendant during the probation period, we hold that the circuit court retained jurisdiction to act upon the petition after the passage of the final day of defendant's original probation period.

II.

Defendant asserts that he was prejudiced by the filing of the supplemental petition 43 months after the initial petition was filed, and that it should not have been considered by the circuit court.

A defendant is entitled to a probation revocation hearing within a reasonable time after the filing of a petition. The determination of what constitutes a reasonable time depends upon the facts and circumstances of each case. Among the factors to be considered are the prejudice claimed or shown by the defendant, and whether the defendant protected his rights by requesting that a hearing be held. *People* v. *Smithson* (1st Dist. 1978), 65 Ill. App.

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[2] The events here are thus distinguishable from those of *People* v. *Ramirez* (1st Dist. 1970), 131 Ill. App. 2d 268, 266 N.E.2d 520, which is relied upon by defendant. There, the defendant's probation term was not tolled by the issuance of a warrant for a crime unrelated to the probation. Here, the defendant's presence in court was at least partially directly related to the probation proceedings.

3d 564, 567, 382 N.E.2d 536, *appeal denied* (1979), 72 Ill. 2d 584.

The sole basis for defendant's argument that he was prejudiced by the delay is his claim that he "lost witnesses necessary to his defense." These witnesses appear to be defendant's sister, who had moved, and a co-defendant who was incarcerated following a plea of guilty. At the hearing, defendant testified that his sister resided in Chicago Heights, Cook County, Illinois. There is nothing in the record to establish why she was unavailable to testify. Similarly, no reason was offered as to why the potential witness who was imprisoned could not be produced. We conclude that defendant failed to demonstrate prejudice due to the delay on this basis.

Defendant claims that his "motion to order an election" constitutes a demand that the hearing proceed. This court believes that the state is correct in retorting that this motion was nothing more than an attempt to clarify defendant's defense posture. Had defendant in fact sought to have the matter adjudicated, a precisely worded demand for such could easily have been made.

Examination of the common law record indicates that defendant was responsible for most of the delays in hearing the matter between the filing of the original petition and May 1977. The record then contains a gap as to what transpired between that point and the filing of the supplemental petition. We are unaware of the causes of the delay during this period. However, we are also unaware of any prejudice caused to defendant during this time, since no facts indicative of such appear in the record. Probation revocation proceedings are not governed by speedy trial provisions applicable to trial proceedings. (See *People* v. *Williams* (2nd Dist. 1973), 10 Ill. App. 3d

428, 430, 294 N.E.2d 61.) There should thus be no presumption that a period of 43 months is inherently prejudicial. (See *People* v. *McGee* (1st Dist. 1977), 49 Ill. App. 3d 523, 526, 364 N.E.2d 546.) Since defendant has failed to adequately demonstrate that he was prejudiced here, the circuit court committed no error in addressing the supplemental petition. (*People* v. *Williams, supra.*) Our holding is not to be construed as an approval of such a lengthy period. We think the 43-month period is much too long. But, the defendant played a large part in creating the delay.

III.

At the hearing, after the testimony of Sergeant Wolfe (who arrested defendant on December 31, 1975), the trial court admitted into evidence two objects recovered by Wolfe from the floor of the black truck located on the Deel lot, from which defendant was seen exiting. These items were admitted over the objection of defense counsel. Defendant urges that this constituted error, and that such error was not harmless.

It is a well established rule that a proper foundation for the admission of real, physical evidence must be laid in order for such evidence to be considered. The foundation may be laid either through identification by a witness or by the establishment of a chain of possession. After reviewing the record, we are satisfied the trial court was correct in admitting this evidence since Wolfe identified the items with certainty as those he had seized on the night of the arrest. See generally *People* v. *Ford* (3rd Dist. 1980), 83 Ill. App. 3d 57, 65, 403 N.E.2d 512, *appeal denied,* 81 Ill. 2d 595; *People* v. *McKnight* (1st Dist. 1977), 55 Ill. App. 3d 1052, 1055-56, 371 N.E.2d 946; *People* v. *Sansone* (2nd Dist. 1976), 42 Ill. App. 3d 512, 514, 356

N.E.2d 101; *People* v. *Pruitt* (2nd Dist. 1974), 16 Ill. App. 3d 930, 941, 307 N.E.2d 142, *appeal denied*, 56 Ill. 2d 584, *cert. denied*, 419 U.S. 968.

The authorities cited by defendant in support of his argument are distinguishable, as in those cases the identification of the items was suspect, the chain of possession was lacking, or the link of the evidence to the defendant was tenuous.[3] Here, none of those foundation flaws exist. Therefore, the trial court did not err in admitting the items into evidence.

IV.

Defendant essentially claims that the state's evidence failed to show by a preponderance thereof that he committed either act upon which the original and supplemental petitions for probation revocation was based.

A.

Defendant argues that the evidence did not prove that the truck he was alleged to have attempted to steal was owned by Deel Ford, or that Deel had not consented to his use of it, so that he was not shown to have committed attempt theft on December 31, 1975. We are satisfied the record, most notably the testimony of Deel's security agent, does establish these elements and complies with existing precedent. See generally *Johnston* v. *Suckow* (5th Dist. 1977), 55 Ill. App. 3d 277, 280, 370 N.E.2d 650; *Elmore* v. *Blume* (3rd Dist. 1975), 31 Ill. App. 3d 643, 647,

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[3] In *People* v. *Brown* (1st Dist. 1972), 3 Ill. App. 3d 879, 279 N.E.2d 382, the policeman kept the evidence (a bottle of whiskey) in his locker, never inventoried it, never sealed it, and did not show that access to the locker was restricted. See also *People* v. *Pendleton* (1st Dist. 1974), 24 Ill. App. 3d 385, 321 N.E.2d 433.

334 N.E.2d 431; *O'Connor* v. *Village of Palos Park* (1st Dist. 1975), 31 Ill. App. 3d 528, 534, 333 N.E.2d 276; see also *In re W.S.* (1980), 81 Ill. 2d 252, 257, 408 N.E.2d 718.

B.

Defendant argues that, concerning the auto parts crime of February 16, 1978, the evidence did not show that the parts were stolen or that he had knowledge of that fact on that date. The record clearly establishes defendant's guilt by a preponderance of the evidence. See *People* v. *Clark* (Docket No. 80-355, 1st Dist. June 23, 1981), ... Ill. App. 3d ....., ... N.E.2d ..... (slip op. at 3).

V.

Defendant asserts that the sentence entered by the court was excessive and that this court should reduce it.

Review of the record indicates that the trial court gave weighty consideration to the matter prior to rendering the sentence. It refused to give the maximum sentence as requested by the state's attorney. It also noted that defendant had violated probation on two separate occasions. Nothing in defendant's argument demonstrates that this result constituted an abuse of the trial court's discretion. Consequently, this court cannot alter the sentence entered. *People* v. *Perruquet* (1977), 68 Ill. 2d 149, 154, 368 N.E.2d 882.

For these reasons, we affirm the findings and sentence of the circuit court of Cook County.

Affirmed.

HARTMAN, P.J., and PERLIN, J., concur.

State of Illinois

Office Of

CLERK OF THE SUPREME COURT

Springfield

62706

Robert H. Gillespy
Clerk

Telephone
Area Code 217
782-2035

January 12, 1982

Mr. Steven B. Muslin
Attorney at Law
100 N. LaSalle St., S#900
Chicago, IL 60602

In re: People State of Illinois, respondent, vs.
Alphonso Randolph, petitioner. No. 55864

Dear Mr. Muslin:

The Supreme Court today made the following announcement concerning the above entitled cause:

The motion by petitioner for leave to file petition for leave to appeal instanter is denied.

Very truly yours,

/s/ Robert H. Gillespy
Clerk of the Supreme Court

RHG/hc
cc: AG-Crim.
Cook SA

State of Illinois

Office Of

CLERK OF THE SUPREME COURT

Springfield

62706

Robert H. Gillespy
Clerk

Telephone
Area Code 217
782-2035

February 17, 1982

Mr. Steven B. Muslin
Attorney at Law
100 N. LaSalle Street
Suite 900
Chicago, IL 60602

In re: People State of Illinois, respondent, vs. Alphonso Randolph, petitioner. No. 55864

Dear Mr. Muslin:

We have today filed an order entered by Justice Seymour Simon granting the motion by petitioner for stay of mandate pending the filing of petition for writ of certiorari in the United States Supreme Court in the above cause.

Very truly yours,

/s/ Robert H. Gillespy
Clerk of the Supreme Court

RHG:jae
cc: Richard Daley
Tyrone Fahner

Office - Supreme Court, U.S.
FILED
SEP 1 [illegible]
ALEXANDER L. STEVAS,
CLERK

No. 82-13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALPHONSO RANDOLPH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

---

RESPONDENT'S BRIEF IN OPPOSITION

TYRONE C. FAHNER,
Attorney General,
State of Illinois,

MICHAEL R. WEINSTEIN,
DANIEL L. PATTERSON,
Assistant Attorneys General,
188 West Randolph Street,
Suite 2000,
Chicago, Illinois 60601,
(312) 793-2570,

Counsel for Respondent.

Rogers Law Printing Co., Chicago (312) 263-4500

QUESTION PRESENTED FOR REVIEW

Whether petitioner was denied his right to a probation revocation hearing within a reasonable time after the filing of the petition to revoke.

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I.	
The Present Petition Presents No Question Of Constitutional Dimension. Instead, Petitioner's Entire Argument Depends Upon His Dispute With The Illinois Courts As To Three Questions Of Illinois Law: (1) Whether The Indictment Was Filed On April 27, 1976, And (2) Whether Petitioner's Period Of Probation Had Expired At The Time Of His Revocation Hearing, And (3) Whether The Delay In Hearing Was In Large Part Due To Petitioner's Actions	3
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On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, is reported at 98 Ill. App. 3d 696, 424 N.E.2d 893 (1st Dist. 1981).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari. (Petition at 2) However, as treated more fully in the argument portion of this Brief in Opposition, respondent does not believe that the petitioner has shown any compelling reason for this Court to grant the Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has quoted those provisions of the United States Constitution applicable to this case. (Petition at 2)

STATEMENT OF THE CASE

Petitioner's rendition of the facts is in almost every instance highly disputable and cannot be relied upon. Respondent submits that the relation of the factual background found in the opinion of the Illinois Appellate Court (Appendix A) is adequate for purposes of this review and is to be preferred.

The specific areas of factual dispute between the parties will be detailed in the argument section of this Brief.

REASONS FOR DENYING THE WRIT

I.

THE PRESENT PETITION PRESENTS NO QUESTION OF CONSTITUTIONAL DIMENSION. INSTEAD, PETITIONER'S ENTIRE ARGUMENT DEPENDS UPON HIS DISPUTE WITH THE ILLINOIS COURTS AS TO THREE QUESTIONS OF ILLINOIS LAW: (1) WHETHER THE INDICTMENT WAS FILED ON APRIL 27, 1976, AND (2) WHETHER PETITIONER'S PERIOD OF PROBATION HAD EXPIRED AT THE TIME OF HIS REVOCATION HEARING, AND (3) WHETHER THE DELAY IN HEARING WAS IN LARGE PART DUE TO PETITIONER'S ACTIONS.

The present petition presents no claim whatsoever of a violation of federal constitutional law. It is insufficient to support the relief sought, grant of the writ of certiorari. Although there is no constitutional right to probation or parole, the State of Illinois concedes that where such dispensations are established by law, as in Illinois, then there are constitutional strictures which apply to the operation of the programs. In particular, it is conceded that petitioner possessed a constitutional right to a hearing prior to the revocation of his probation, and it is conceded that, "A defendant is entitled to a probation revocation hearing within a reasonable time after the filing of a petition." *People v. Randolph*, 98 Ill. App. 3d 969 (1st Dist. 1981); Pet. App. at 6. Both of these rights were recognized and enforced by the Illinois Appellate Court in petitioner's case.

Petitioner's claim that his revocation hearing was not within a constitutionally permissible period of time depends entirely upon his assumption of a factual background at odds with the conclusions of the Illinois courts. Contrary to petitioner's claim (Pet. at i), the Illinois courts did not conclude that there had been no in-

ordinate delay after first finding that the state had waited 43 months to file its petition and that the term of probation had expired at the time of the hearing. That Court's opinion clearly demonstrates that its decision that there was no constitutional violation flows from its findings, under Illinois law, that the State had validly filed its petition for revocation shortly after the incident which caused the revocation, that this action tolled the running of the term of probation so that the hearing was not held outside of that period, and that a large part of the delay in holding the hearing was attributable to requests for continuance and other actions undertaken by the defendant. (See Pet. Appendix at 6-8)

Petitioner does not allege that the findings of the appellate court were based on insufficient evidence, logically deficient, or otherwise erroneous. He simply ignores them and alleges contrary facts. Such argument presents nothing for review in this Court. The long-standing policy of this Court has been succinctly stated by Justice Holmes: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 45 S.Ct. 496, 497 (1925)

The principal factual errors contained in petitioner's argument are as follows:

1. The claim that "petitioner's four-year probationary term ended on June 18, 1979", prior to the revocation hearing is false. (Petition at 9) The appellate court specifically found that the term of probation had been tolled by the State's filing on April 27, 1976, and petitioner was thus still on probation at the time of his hearing. (*People v. Randolph*, App. at 5)

2. The claim that both the appellate court and the State concede that no revocation petition was

filed on April 27, 1976 is false. (Pet. at 9) The appellate court specifically found that the actions of the State on April 27, 1976 constituted a sufficient filing of the petition under Illinois law: "We consequently must reject defendant's assertion that no petition was filed on the noted date." (*People v. Randolph*, App. at 5)

3. The claim that "it is thoroughly unexplainable why the State took no action on said petition" prior to the eventual hearing (Pet. at 10) completely ignores the explanation provided by the appellate court: "Examination of the common law record indicates that defendant was responsible for most of the delays in hearing the matter between the filing of the original petition and May 1977." (Appendix at 7)

4. The claim that petitioner's term of probation "was never tolled in accordance with the statutory requirements" (Pet. at 10) is directly contrary to the finding of the Illinois Appellate Court, which cites and interprets the relevant statute. (See Appendix at 5-6)

All of the above-outlined factual misstatements clearly demonstrate that the present petition presents nothing for the proper review of this Court, but is instead an attempt to relitigate the facts of record.

The respondent would also note that the conclusions of the Illinois Appellate Court regarding the lack of any prejudice suffered by the petitioner as a result of the delay in hearing are relevant. Even assuming the factual background which he alleges, the injury claimed is highly speculative and *de minimus*. The argument that a witness was lost by reason of the delay was specifically rejected by the appellate court (App. at 7), which

concluded on its review of the record that no prejudice had been shown. Thus, the present petition only presents a ground for relief where all of the disputed facts claimed by the petitioner are conceded and where it is presumed that a 43 month delay in hearing, partly caused by the defendant, is per se unreasonable and constitutes a denial of due process. The Illinois Appellate Court refused to acknowledge this presumption, citing *People v. McGee*, 49 Ill. App. 3d 523, 526, 364 N.E.2d 546 (1st Dist. 1977). The petitioner has cited no legal authority in support of this position, and it should be again rejected in this Court.

CONCLUSION

For the foregoing reasons, respondent prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General,
State of Illinois,

MICHAEL B. WEINSTEIN,
DARRELL PANETHIERE,
Assistant Attorneys General,
188 West Randolph Street,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,

Counsel for Respondent.

September 3, 1982